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No.

IN THE

Supreme Court of the United States

October Term, 1982

LEMUEL MONT,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the incorporation of two separate conspiracies into a single indictment and trial violated the rules set forth in *Kotteakos v. United States*, 328 U.S. 750, 775 (1946), in violation of the Fifth Amendment of the United States Constitution.

2. Whether the introduction of hearsay evidence violated petitioner's right to a fair trial and to confront witneses under the Fifth and Sixth Amendments of the United States Constitution.

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1982

LEMUEL MONT,

Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS SECOND CIRCUIT

Lemuel Mont petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals, Second Circuit, in this case.

OPINIONS BELOW

There is no written opinion by the United States District Court, Southern District of New York. The opinion of the United States Court of Appeals Second Circuit, is as yet unreported and is set forth in the appendix.

JURISDICTION

The judgment of the United States Court of Ap-

peals, Second Circuit, was entered on March 4, 1983. The jurisdiction of this Court is invoked pursuant to Title 28 of the United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Sixth Amendment to the United States Constitution which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTORY PROVISION INVOLVED

Title 21 of the United States Code, §846, provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

Petitioner was convicted, along with Yvette Carson and Kenneth Thomas, of conspiracy to possess with intent to distribute heroin in violation of 21 USC 841, 21 USC 846, and one substantive count. Petitioner was sentenced to concurrent terms of 30 years imprisonment and a special parole term for life. Following the affirmance of the judgment of conviction by the United States Court of Appeals for the Second Circuit petitioner, who had been free pending the determination of the appeal, duly surrendered and is presently incarcerated pursuant to the judgment.

The government's proof against petitioner consisted primarily of testimony from an undercover federal agent, Robert Baker, who testified that he met an individual named Guy Wilkins from whom he made a narcotics purchase on June 24, 1980 at the "Our Place" bar located at 130th Street and Amsterdam Avenue in Manhattan. Baker pressed Wilkins for an opportunity to meet his supplier. Wilkins told the agent that he had several sources. He told Baker that his source in regard to the proposed sale of an eighth of a kilogram of heroin was the owner of the "Our Place" bar. Ultimately, Baker refused to purchase the eighth of a kilogram of heroin because he wanted a "guarantee" from Wilkins' supplier. In August of 1980, Baker suggested that he could furnish Wilkins'

source with a quantity of Quinine. Discussions ensued between Baker, Wilkins and his brother, David Wilkins in September, 1980, at the "Our Place" bar. At that meeting, Wilkins told Baker that his supplier was a major heroin dealer and that the sister of the source was a courier for the "Italians." Three days later, Baker was again told that Wilkins had a "new supplier." He then advised Wilkins' cohort "Peques" that he was in possession of a quantity of stolen liquor, and suggested that he arrange a sale of the liquor with the owner of "Our Place" (Mont).

On the same date Baker met with Wilkins and advised him that he was going to Atlanta, Georgia, adding that he desired to meet someone in that city. Through Wilkins' intercession, Baker met an individual named "Sam" in Atlanta. At this meeting, Sam told Baker that he could not supply him with a large amount of heroin and that Wilkins had been mistaken. Sam further stated that he was not a heroin dealer but a marijuana dealer. Sam made several phone calls to individuals who knew "connections" in New York, but was unsuccessful. According to Baker's testimony, Sam then said, "He said to me then 'Why don't you go to Lam?' and I said, 'Who is Lam? Is he the owner of Our Place bar?' and he said, 'Yes . . . he is probably doing the largest amount of heroin in Manhattan.' There was some more conversation."

On October 3, 1980, having returned to New York, Baker met with petitioner Mont and transacted a sale of liquor with him. During this period of time Baker continued to engage in narcotics transactions at the Our Place bar with Guy Wilkins. At that time, he suggested to Guy Wilkins that his brother David should

not have any trouble guaranteeing the quality of the drugs. When Wilkins inquired as to how he knew about David Wilkins, Baker replied that "Sam told him."

Baker observed petitioner Mont in the Our Place bar on October 2, 1980. On the following day, Mont purchased liquor from Baker. Later that day, Baker and Mont travelled from the bar to a location in Queens, where the liquor was delivered. While in the car, Baker expressed dissatisfaction with the way the Wilkins brothers conducted their business. He also told Mont that he had Quinine to sell and that he wanted a reliable supplier of narcotics.

Upon their return to the bar, Mont paid Baker $900.00 for the liquor. Two of the bills contained the same serial numbers as those previously passed to the Wilkins brothers during narcotics transactions a few days before. Mont and Baker had conversations about obtaining heroin, but no transaction was ever consummated.

On October 23, 1980, Baker and Mont again met at the Our Place bar. While at the Bar, Baker received a telephone call from Guy Wilkins. During the telephone conversation the two men discussed the sale of Quinine. Wilkins told Baker something about "a new source of supply." On October 27, 1980, Mont purchased a quantity of Quinine from Baker for approximately $400.00. Two days later, Baker and Mont had another fruitless conversation about narcotics. Thereafter, Guy Wilkins came into the bar and told Baker that he had a sample from his "new source." He added that Mont had given him the Quinine. Wilkins went on to explain that Mont had given him a less po-

tent cut of heroin as an explanation for why he had discontinued buying from Mont.

The rest of the testimony given by Agent Baker which covered almost a year of undercover activities resulting in narcotics transactions made not the slightest reference ot petitioner Mont. Rather, they involved an entirely separate cast of characters, save the Wilkins brothers, and involved activities that had no connection to the Our Place bar and is carefully set forth in the opinion of the Court of Appeals in linking Carson and Thomas to the ostensible single conspiracy.

However, some time later in the trial, after Baker had completed his testimony, he was recalled by the government to relay a conversation between Wilkins and himself wherein Wilkins was alleged to have said that there was "some affiliation" between Mont and his "new source."

In pertinent part, the defense called Guy Wilkins to the stand to testify that he had indeed engaged in narcotics transactions outside the Our Place bar and that he knew petitioner Mont (Lam) and stated that he was, to his knowledge, in the policy business. He denied ever telling the agent that the source of his drugs was the owner of the Our Place bar.

POINT I

THE PROOF ADDUCED AT TRIAL, IF BELIEVED, OVERWHELMINGLY ESTABLISHES TWO SEPARATE CONSPIRACIES IN VIOLATION OF THE RULE SET FORTH IN *KOTTEAKOS V. UNITED STATES.*

In *Kotteakos v. United States*, 328 U.S. 750, 775 (1946), this Court recognized that a defendant had the "right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others." In the case at bar, the evidence is grossly insufficient to permit a rational fact finder to conclude that petitioner had a conspiratorial relationship with the defendants with whom he was tried. [*Cf., Jackson v. Virginia*, 443 U.S. 307 (1979); *Glasser v. United States*, 315 U.S. 360 (A42)].

Rather, it is painfully apparent assuming, *arguendo*, that sufficient proof was adduced to link petitioner conspiratorially with Guy Wilkins, the individual through whom the undercover agents originally sought to purchase drugs, the evidence overwhelmingly establishes that petitioner had nothing to do with the alleged drug trafficking engaged in by the co-defendants. Thus there were manifestly two separate conspiracies.

The Second Circuit's affirmance of petitioner's conviction typifies that court's reluctance, indeed aversion, to the application of the *Kotteakos* rule. The predilection of that court, coupled with the disinclination of this Court to review these determinations has afforded the government virtually unbridled discretion to lump wholly disparate individuals and enterprises into a single trial.

It would be difficult indeed to conjure up a viable government interest in proceeding in such a fashion that would outweigh the manifest hardship that this practice works upon defendants. The value to the government would seem to lie mainly in the area of

economy of resources and convenience. Indeed, as petitioner suggested in the court below, often the strongest connective thread of these prosecutions is not the coordinated activity of the alleged co-conspirators but, rather, the activity of the undercover operatives themselves. Simple logic would compel the conclusion that their investigations must take them into areas that exceed the boundaries of a single conspiracy. Yet inevitably the entire breadth and length of the undercover operation is incorporated into a single conspiracy charge resulting in a single trial.

The dubious value of the government being afforded the convenience of incorporating disparate crimes and defendants into a single trial is clearly and definitively outweighed by the prejudice suffered by the defendant. First, all defendants charged with conspiracy must inevitably suffer from the application of the co-conspirator exception to the hearsay ban. The problem is endemic to undercover operations wherein the trial inevitably features extensive police testimony of conversations with ostensible co-conspirators, the contents of which are often quite damaging to other defendants. Obviously in a circuit such as the Second where the single conspiracy doctrine is so loosely applied, the application of the co-conspirator hearsay exception is expanded to the same degree.

Similarly, the prejudices suffered by defendants lumped together in a single trial from the danger of "guilt by association" are compounded when the government is as free as Second Circuit prosecutors to include wide-ranging classes of defendants into a single trial.

Through a series of decisions, the Second Circuit has constructed a web of roadblocks which cumulatively work to vitiate any meaningful application of the *Kotteakos* rule. *[United States v. Alessi,* 638 F.2d 466 (2d Cir. 1980); *United States v. Panebianco,* 543 F.2d 447 (2d Cir. 1976); *United States v. Tramunti,* 513 F.2d 1087 (2d Cir. 1975); *United States v. Sperling,* 506 F.2d 1323 (2d Cir. 1974); *United States v. Bynum,* 485 F.2d 490, *rev'd on other grounds* 417 U.S. 903 (1974); *United States v. Cianchetti,* 315 F.2d 584 (2d Cir. 1963)]. The result is that, despite the fact that the record proof at bar overwhelmingly establishes the existence of two conspiracies, the court below, in its opinion carefully isolates specific arguments and rejects them *ad seriatum* on the basis of cases wherein the single contention was the entirety of the argument. By doing so it violated its own maxim that "pieces of evidence must be viewed not in isolation but in conjunction" [*United States v. Gainey,* 417 F.2d 1116, 1121 (2d Cir. 1969)]. Buttressed by the twin stanchions of appellants' "very heavy burden" to overturn a jury determination [*United States v. Losada,* 674 F.2d 167, 173 (2d Cir. 1982) and the ever-present catch-all phrase "loosely-knit organization" (*cf.,* opinion below, 1a), the Second Circuit virtually immunizes jury verdicts from a *Kotteakos* attack no matter how compelling the claim.

No fair reading of this record can lead to any other conclusion but that petitioner Mont had absolutely no interest, involvement, stake or connection with the activities of any of the business conducted by Galloway, Chaffin, Carson, Nunes, et. al; all of whom comprised a separate and unrelated conspiracy. They were separated by time, goegraphy and to a large extent membership from the early activities of Guy Wilkins

with which Mont was tangentially linked by hearsay and circumstantial evidence, if the government's evidence is believed. As such, their activities should not have been introduced at trial against Mont.

The government's articulated structure of the "loosely-knit confederation" places Mont—together with the Wilkins brothers, in a line of distribution underneath the top tier "occupied by Fred Chaffin and Fred Galloway." There is, however, not the slightest proof in this record that Mont ever received heroin from any of the named conspirators. Indeed there is but one thin strand linking Mont with any of the other suppliers—Wilkins' claim that "there was some affiliation" between Mont and the then unnamed "new source." But the nature of the relationship is absolutely undefined and, more importantly, the record is conspicuously silent of event he slightest reference to Mont from October 31, 1980 to October 4, 1981, the day Mont was arrested.

On October 31, 1980, Agent Coleman received a sample of heroin from Wilkins' "new source." Thereafter, the testimony described a series of drug transactions, some in November, 1980, but the majority between May and August of 1981 between federal agents and, other than Wilkins and his brother, an entirely new cast of characters.

The government attempts to bridge this total absence of Mont from the second conspiracy through reference to Wilkins' brother David. In their brief, they state that on October 28, 1980 "Wilkins described the relationship between Mont and David as that of 'partners'—a description that Mont was advised of and did not dispute" (Government's Brief, p. 26). That

Mont did not dispute this description is an unfair claim. For as the record indicates, Mont's actual response to the characterization was that "Guy Wilkins, whenever he wanted some clout in his words or his commitments would use his name." Respectfully, this statement by Mont is most fairly construed as, at the least, a constructive denial that such a relationship existed.*

Nevertheless, it is on the basis of David Wilkins' contacts with Guy Wilkins' new suppliers that the government stakes its claim that Mont was part and parcel of the second conspiracy. This assertion is, as indicated previously, predicated upon an erroneous premise, to wit, that Mont and David were once and remained partners. The predicate having no basis in fact, it follows that David's continuing involvement in the new conspiracy sheds no light on Mont's own involvement or non-involvement. Moreover, if the imaginary Mont-David relationship sparked even a glimmer of possibility that it evidence Mont's involvement, surely that possibility is extinguished by David's own death, which apparently occurred in May, 1981, *prior* to most of the drug transactions which form the basis for this aspect of the conspiracy count.

There is no great mystery as to why there is no evidence concerning Mont after October, 1980 in this

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* Even more disturbing is the government's claim that "Mont and David" had previously "received their heroin from Chaffin—their source of supply" (Government's Brief, p. 26). Petitioner notes, without comment, that this damaging assertion contains no reference to the record, is not in the government's statement of facts and that petitioner has thus far been unable to unearth support for this assertion in the record itself.

record. Wilkins clearly and unequivocably asserts by both word and subsequent deed at this point in time that he is severing his business relationship with "him." The record is replete with references to the "new source" and Wilkins' subsequent actions make that severence indisputable. It is simply beyond cavil that whatever conspiracy may have existed between Mont and Wilkins abruptly ended when Wilkins elected to do business with a new supplier.

A conspiracy charge is not measured by the length or continuity of a particular undercover operation. It is not designed to be a mosaic upon which the government may trace, for a single jury, the entire length and breadth of, as here, a sixteen month investigation. Nor is it a device by which the government can consolidate the disparate activities of a professional criminal (Wilkins) without substantive proof that those lumped under the conspiratorial umbrella themselves shared a common purpose with each other. The conspiracy charged here is clearly a reflection of governmental convenience, rather than genuine common criminal enterprise.

This case presents an appropriate vehicle for this Court to examine the appellate court's "construction of a major Federal statute," or statutes, to wit, the conspiracy statutes [*United States v. Donovan*, 429 U.S. 413 (1977)]. Manifestly, the prolific use of these statutes in federal criminal prosecutions cannot be overstated. Nor can it be seriously disputed that, however valuable a tool these statutes are to the government's pursuit of criminal activity, a defendant's right to a fair trial and his right to confrontation (United States Const. Amends. V and VI) are almost always materially diminished by the multi-

defendant trial and the extensive use of hearsay testimony, both of which routinely characterize conspiracy prosecution.

Because of the inherent prejudice that conspiracy trials normally engender, it is important that appellate courts review such prosecutions with special scrutiny [*Anderson v. United States*, 417 U.S. 211 (1974)]. It is in this context that petitioner contends that the pattern of forebearance of the Second Circuit in applying the *Kotteakos* rule presents a "troublesome question in the administration of criminal justice" which warrants review in this Court. [*Linkletter v. Walker*, 381 U.S. 618, 620 (1965)].

POINT II

THE ADMISSION OF THE STATEMENT OF "SAM" WAS GROSSLY PREJUDICIAL AND VIOLATED PETITIONER'S RIGHT TO CONFRONTATION.

As set forth in the statement of the case, the government's key witness, Agent Robert Baker, testified that during the course of his undercover activities he had occasion to go to Atlanta, Georgia, where he attempted to make a narcotics connection with an individual named Sam. There was not the slightest suggestion that Sam had any connection with the conspiracy on trial. As such, his statements could not be deemed to have been admissible under the co-conspirators exception to the hearsay rule. [*United States v. Gainey*, 417 F.2d 1116 (2d Cir. 1969); *United States v. Alvarez-Porras*, 643 F.2d 54 (2d Cir. 1981); *United States v. Lieberman*, 637 F.2d 95 (2d Cir. 1980); *United States v. Cambindo-Valencia*, 609 F.2d 603 (2d Cir. 1979); *United States v. DiPalermo*, 606 F.2d 17 (2d Cir. 1979); *United States v. Ragland*,

375 F.2d 471 (2d Cir. 1967); *United States v. DeFillippo,* 590 F.2d 1228 (2d Cir. 1979)]. Sam's statement, therefore, was the rankest form of hearsay. Moreover, the content thereof was the wildest form of speculation or opinion. Indeed, one could hardly conjure up a less reliable nor more prejudicial piece of evidence than that offered by Sam. Of course, the fact that Sam himself did not testify but, rather, the statement came in through the hearsay assertion of Agent Baker, rendered the statement utterly and wholly immune from cross-examination. This admission of testimony clearly violated petitioner's Sixth Amendment right to confrontation. [*Ohio v. Roberts,* 448 U.S. 56 (1980); *Dutton v. Evans,* 400 U.S. 74 (1970); *California v. Green,* 399 U.S. 149 (1970)].

The court below's rejection of this claim as harmless error is, to say the least, distressing. In its haste to rebuff the obvious claim that the proof at trial established more than one conspiracy, the court has characterized the proof of guilt against petitioner as sufficiently powerful so as to sustain a harmless error assertion even with respect to such obviously improper and damning testimony such as the "Sam" statement. In truth, however, there was not a breath of testimony demonstrating that petitioner had done anything but talk to Agent Baker about potential narcotic transactions that never in fact took place. The undercover agents succeeded only in selling the bar owner a quantity of liquor which they asserted was stolen and a quantity of Quinine, which the agent later claimed that Wilkins asserted was contained in a quantity of heroin offered to the agent by Wilkins. The only other proof connecting Mont to this first conspiracy was Baker's testimony that Wilkins claims that he and Mont were partners. This assertion, of

course, was dismissed by Mont when the agent subsequently made it known to him (see petition, Point I).

Wilkins himself testified at trial that he had never made such a statement about Mont to the agent and that he knew Mont to be in the policy business. Additionally, although the government places great reliance upon the fact that two of the bills furnished to the agent by Mont in payment for the liquor had been previously given to Wilkins in payment for a heroin transaction, it seems obvious that, given Mont's ownership of the bar in which the transaction was arranged, it is easily explainable as legitimate proceeds of the night's bar tab.

Whether this evidence is sufficient to establish by non-hearsay evidence Mont's participation in the conspiracy is itself a serious question. [*Glasser v. United States,* 315 U.S. 60 (1942); *United States v. Gainey, supra,* 417 F.2d 1116 (2d Cir. 1969)]. But it seems almost beyond cavil that such proof is sufficiently tenuous so that it could not withstand the most tortuous construction of the harmless error doctrine. [*Chapman v. California,* 386 U.S. 18 (1967); *Harrington v. California,* 395 U.S. 250 (1969)]. The introduction of this patently improper testimony deprived petitioner of a fair trial [U.S. Const. Amend. V).

CONCLUSION

FOR ALL OF THE FOREGOING REASONS THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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APPENDIX
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 149, 150, 151—August Term, 1982
(Argued October 19, 1982 Decided March 4, 1983)
Docket Nos. 82-1109, 82-1113, 82-1115

UNITED STATES OF AMERICA,

Appellee,

v.

YVETTE CARSON, LEMUEL MONT, a/k/a "Lam," and KENNETH THOMAS, a/k/a "Kenneth Davis,"

Defendants-Appellants.

Before:

OAKES AND WINTER, *Circuit Judges,*
and MacMAHON, *District Judge.**

Appeals from judgments of conviction entered in the United States District Court for the Southern District of New York after a four-week jury trial before Brieant, *Judge,* for conspiracy to distribute and possess with intent to distribute heroin, in violation of 21 U.S.C. §846, and for distribution and possession with intent to distribute heroin, in violation of 21 U.S.C. §§812, 841(a)(1), (b)(1)(A), and 18 U.S.C. §2.

Affirmed.

PATRICIA ANNE WILLIAMS, New York, New York (John S. Martin, Jr., United States Attorney for the Southern District of New York, Roanne L. Mann and Walter P. Loughlin, Assistant United States Attorneys, New York, New York, on the brief), *for Appellee.*

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MICHAEL YOUNG, New York, New York, *for Defendant-Appellant Thomas.*

MacMAHON, *District Judge.*

Yvette Carson, Lemuel Mont and Kenneth Thomas appeal from judgments of conviction entered in the United States District Court for the Southern District of New York after a four-week jury trial before Honorable Charles L. Brieant, *Judge.*

The fifteen-count indictment charged Carson, Mont, Thomas and sixteen co-defendants with violations of the federal narcotics laws. Count 1 charged all defendants with conspiracy to distribute heroin and to possess it with intent to distribute from June 1980 until October 1981, in violation of 21 U.S.C. §846 (1976).[1] The remaining counts (Counts 2 through 15) charged various defendants with distribution of heroin and possession with intent to distribute, in violation of 21

U.S.C. §§812, 841(a)(1),(b)(1)(A) (1976), and 18 U.S.C. §2 (1976).[2] Carson was charged in three substantive counts (Counts 13 through 15) and Mont in seven counts (Counts 3 through 9). Thomas was named in the conspiracy count only.

Trial commenced against Carson, Mont, Thomas and co-defendant Gayburnetta Galloway.[3] At the close of the government's case, Judge Brieant dismissed Count 13 against Carson and Counts 3 through 6 against Mont and consolidated Counts 8 and 9 which named Mont.

After deliberating for three days, the jury found Carson guilty of the conspiracy count and one of the remaining substantive counts (Count 15), but found her not guilty on the other substantive count (Count 14). Mont was found guilty on the conspiracy count, the consolidated substantive count (Count 8), and the remaining substantive count (Count 7). The jury found Thomas guilty on the conspiracy count. Galloway was found not guilty on the conspiracy count, and the jury was unable to reach a verdict as to her on the substantive count (Count 15).[4]

Viewed most favorably to the government, the proof showed a loosely-knit organization engaged in the distribution of heroin. Initially occupying the upper echelon were Fred Galloway and Fred Chaffin, who received heroin from sources identied as "the Italians" and distributed it through their network of associates. Chaffin was ultimately supplanted by Carson, who was affiliated with Guy Wilkins. Prior to his ouster in the summer of 1981, Chaffin served as both source and partner to the conspirators at the next level of distribution, Carson, Mont, and, at times, Guy

Wilkins. These individuals cut heroin for further distribution and engaged in wholesale transactions as well. Carson's subordinates included her brother, Kenneth Nunes; Thomas Wilson; appellant Thomas and his brother, Howard Thomas; and the workers in Carson's cutting mill located at her residence. Wilkins' subordinates were Arthur Collins; Wilkins' brother, Michael Green; and Anthony and Philip Pegues. Working as distributors for Mont were Shawn Lovett; David Wilkins; and, prior to his advancement through the organization, Guy Wilkins. The roles of the various defendants became apparent during the course of sixteen months of undercover investigative work by agents of the Drug Enforcement Administration ("DEA"), who made fourteen purchases of high-quality heroin for approximately $151,400, and two pounds of quinine.

The principal evidence linking each appellant to the conspiracy is:

MONT

The evidence demonstrated that Mont was a major distributor of heroin. He was variously described as owning or operating the *Our Place Bar,*[5] a heroin marketplace. Thus, on several occasions, Guy Wilkins sold heroin to DEA Agents Baker, Coleman and Williams at or in the vicinity of the *Our Place Bar.* On August 13, 1980, Wilkins sold a sample to the agents and informed them that he and his brother, David Wilkins, received their heroin from the same source—the owner of the *Our Place Bar.*[6] During this sale, the agents indicated that they could sell quinine to Wilkins' source, and Wilkins agreed to arrange a meeting between his source and the agents. On

September 29, 1980, Guy Wilkins sold the agents two ounces of heroin for a price of $20,000 at the *Our Place Bar.*

Mont's heavy involvement in the heroin business was solidly shown by his dealings with the agents in October 1980. On October 3, Agents Baker and Coleman met with Mont at the *Our Place Bar,* and he agreed to purchase liquor from them.[7] En route to Queens to pick up the liquor, Baker told Mont that he was unhappy with the Wilkins brothers and was seeking a reliable source of heroin. Baker also offered to sell some quinine. Mont replied that he had heroin connections and could supply the four ounces that Baker wanted. After picking up the liquor, they returned to the bar, where Mont paid Baker $900 for the liquor in $100 bills. The serial numbers on two of the bills matched those on two of the bills that the agents had paid to Guy Wilkins for the heroin the agents bought on September 29. Mont stated that his connection was returning that evening and that the agents should remain at the bar. After a wait of two hours, nobody appeared and the agents left.

On October 27, Mont asked Baker about the quinine that Baker had offered on October 3. Baker replied that he had ten pounds left. Mont was interested and said he would speak to his connection about selling heroin to Baker. The following day, Guy Wilkins called Agent Coleman seeking immeidate delivery of a pound of quinine for David Wilkins and Mont. Wilkins stated that he, his brother David, and Mont were partners in the heroin business. That evening, Agents Baker and Williams sold the pound of quinine to Mont at the *Our Place Bar* for $400. When informed as to what Wilkins had said about Mont's

partnership with Guy and David Wilkins, Mont replied that Guy Wilkins used Mont's name when Wilkins wanted "some clout in his commitments." When Baker asked Mont about purchasing heroin, Mont indicated that he would have his connection bring a sample to the bar the next day.

On the following day, October 29, Agents Baker and Coleman arrived at the *Our Place Bar,* where they observed Mont, David Wilkins and Shawn Lovett conversing. David Wilkins went to the telephone, and Mont told the agents that he was trying at that very moment to get his heroin connection to bring a sample to the bar. David Wilkins and Lovett left the bar after again speaking with Mont. Guy Wilkins arrived and told the agents that he had received the quinine that they sold to Mont, that David Wilkins had given Mont the money to pay for the quinine and that Mont had recently sold David Wilkins an eighth of a kilogram of heroin.

CARSON

Carson's role in the conspiracy was shown in a series of meetings between the conspirators and the agents. On July 21, 1981, Wilkins agreed with the agents to arrange their purchase of heroin from Fred Galloway. Subsequently, on July 25, the agents went to the *Flash Inn* at the appointed time and place. When Wilkins arrived, he was accompanied by Carson, whom he introduced as his "partner." Carson told the agents that she had met Wilkins through Fred Chaffin and acknowledged that she and Wilkins were now partners. Wilkins, Carson and Agent Johnson discussed the irony of Wilkins' dealing Carsons narcotics over a year, although neither was

known to the other. Wilkins stated that Carson had an overseas heroin connection,[8] and Johnson asked Carson how it worked. Carson replied that a friend of hers had the connection, that her friend employed overweight women to carry the heroin into the country on their person, and offered to act as an intermediary between her friend and the agents if the agents wanted to buy heroin. Agent Williams asked Carson if she knew the people whom they were going to do business with that morning. Carson stated that she did and that she had met them through her "old man."

Later that day, at *Close Encounters Discotheque,* where the sale was consummated, Carson elaborated on her role in the heroin business.[9] She told Agent Williams that her "old man" was in jail, that she was running his heroin business, and that she had to be careful because she wanted to save money to "set him up right" upon his release from prison. She also stated that she had been Chaffin's partner for quite a while and that their partnership had ended "just recently."

On July 28, 1981, Agents Johnson and Baker met with Guy Wilkins and Carson's son, Kevin, at the *Flash Inn.*[10] Wilkins stated that he and Carson each had a half-pound of heroin and needed quinine. Later that day, Johnson and Baker met with Wilkins and Carson at a *Jack-in-the-Box* restaurant in the Bronx. Carson said that she was rushed because of the presence of customers from Washington, D.C., to whom she was selling heroin. She also told Johnson that she would meet two potential sources later in the week and that she was "not too sure" about one but "85 per cent sure" of the other. Baker told Carson that he wanted to become her partner and asked her to

mention him to her "Italian source," whom she planned to meet on July 30. Carson also reiterated the existence of her partnership with Wilkins.

On July 31, 1981, Agents Baker and Williams met with Wilkins, and Baker asked Wilkins what had become of Carson. Wilkins stated that Carson had visited a prison to obtain a reference for her introduction to some "Italian sources." Baker then asked if Carson had spoken to the "Italian source" regarding Baker's becoming a partner. Wilkins replied that the source had refused to meet with Baker.

The scope of Carson's involvement in the conspiracy was further evidenced in an aborted heroin transaction which took place on August 10, 1981. On that date, Agents West and Johnson met with Howard Thomas and Kenneth Nunes, Carson's brother, to purchase heroin. Nunes stated that he had to call his sister to approve the deal, then left the group and placed a telephone call. When he returned, Nunes said that his sister did not want to deal with the agents because Johnson asked "a lot of questions" the last time he met with her. On that evening, Howard Thomas also informed Agent West that Nunes was Carson's brother and that since Johnson knew Nunes, Johnson could go to Carson's house, which was the cutting mill. There, Thomas said, Carson employed six or more persons to cut and package heroin.

On August 12, 1981, Agent West, accompanied by an informant, conversed with Howard Thomas regarding Nunes' refusal to deal with the agents on August 10. Thomas indicated that Nunes had told him that Carson did not want to conduct business

with Agent Johnson because the agents had asked "too many questions" on July 25. Thomas, apparently referring to the July 25 sale, also said that Carson had done a prior deal with Agents Johnson and West, and that Nunes was a runner and cutter for Carson.

KENNETH THOMAS

Evidence tying Thomas to the conspiracy is as follows: On July 21, 1981, Agents Johnson and West negotiated with Kenneth's brother, Howard Thomas ("Howard"), for the purchase of one ounce of heroin. During the course of the negotiations outside the *Star Lounge,* the agents observed Thomas engaging in what appeared to them to be drug transactions, *i.e.,* individuals approached Thomas and gave him money in exchange for something furtively handed to them by Thomas. Later that day, Howard introduced the agents to Thomas Wilson ("Hillside"), who sold them approximately one ounce of heroin for $8,500.

On August 6, 1981, Agents Johnson and West returned to the vicinity of the *Star Lounge,* where they asked Thomas if he could locate Howard. Thomas replied that Howard had told him what the agents wanted. Thomas then entered the agents' car and directed their search for Howard, whom they eventually found at the *Star Lounge.* Howard approached the car and Thomas left, positioning himself on a street corner. A short time later, Thomas approached Howard and attempted to hand him some money; Thomas was told to wait, and he returned to the corner. Thereafter, a woman approached Howard and asked if he "had anything;" Howard directed her to the corner where Thomas and others were standing.

On August 10, 1981, the agents again returned to the vicinity of the *Star Lounge,* where they met Howard. Howard indicated that his sources were temporarily out of heroin but would be resupplied that evening. Later, while waiting for Wilson to arrive, Howard told Agent Johnson that Wilson was one of only six or eight people who could go to the mill where the heroin was cut and that he, Howard, had been there only eight times during the past two and one-half years. While waiting, the agents watched Thomas, Howard and others engaging in numerous furtive exchanges which appeared to the agents to be narcotics transactions.

Later that evening, Howard suggested that the agents buy heroin from another source, which he indicated as someone sitting in a Lincoln Continental parked in front of the agents' car. When the agents seemed reluctant, Howard assured them that this person's heroin was from the same source as that provided by Wilson. The agents agreed to buy the heroin from the person in the Lincoln Continental, but the transaction did not take place because Thomas, Howard and a young woman spotted a surveillance vehicle across the street, walked toward it, and stood facing the vehicle for a short time. The driver of the Lincoln Continental spoke briefly to the surveillance agent, who thereupon drove away from the area. Howard then advised the agents that there were a lot of police nearby.

On October 20, when Thomas was arrested, he had upon his person two small glass vials (one with traces of heroin and another with traces of cocaine), one cellophane bag containing traces of lactose, and several small empty cellophane bags.

DISCUSSION

A. Claim Common to All Appelalnts: Single v. Multiple Conspiracies.

Mont argues that the evidence established multiple conspiracies rather than the single conspiracy charged in the indictment. Carson and Thomas adopt this argument; in addition, they challenge the sufficiency of the evidence supporting their convictions on the conspiracy count. Judge Brieant charged the jury on the issue of multiple conspiracies, and no appellant claims error in the charge. Our inquiry, therefore, is directed to whether the evidence supports the jury's finding that the government proved the conspiracy charged in Count 1 and each defendant's participation in it.[11] *United States v. Alessi,* 638 F.2d 466, 472-73 (2d Cir. 1980); *United States v. Taylor,* 562 F.2d 1345, 1351 (2d Cir.), *cert. denied sub nom. Salley v. United States,* 432 U.S. 909, 97 S.Ct. 2958, 53 L.Ed.2d 1083 (1977).

The law regarding claims that the proof demonstrates multiple conspiracies was recently summarized by us in *United States v. Alessi, supra,* 638 F.2d at 472-73. We inquire whether the evidence

> supports a finding that the alleged conspiracy was proved and that each appellant was a member of it and, if not, whether the variance substantially prejudiced any of the appellants. Having in mind that "the gist of the offense remains the agreement," *United States v. Borelli,* 336 F.2d 376, 384 (2d Cir. 1964), *cert. denied sub nom. Mogavero v. United States,* 379 U.S. 960, 85 S.Ct. 647, 13 L.Ed.2d 555 (1965), we must, in order to resolve these issues, ex-

> amine the evidence to determine what kind of agreement or understanding could reasonably have been found to exist as to each appellant. This requires a review of the defendants' activities as a whole in order to determine the scope of the criminal enterprise or enterprises and whether any of them fits the pattern of the conspiracy alleged in the indictment. The next step is to review each appellant's conduct and statements to determine whether it could reasonably be inferred that he participated in the alleged enterprise with a consciousness of its general nature and extent.... Proof of an appellant's membership depends upon the extent of his knowledge, given the scale of the criminal enterprise (citations omitted).

Count 1 charged the defendants with a conspiracy, extending from June 1980 through October 1981, to possess with intent to distribute and to distribute heroin. There was evidence from which the jury could have found the existence of a single conspiracy. When viewed in the light most favorable to the government, the proof showed that Fred Galloway and Fred Chaffin distributed large quantities of heroin that they received from sources identified only as "the Italians."[12] The connection between Galloway and Chaffin, on the one hand, and Guy Wilkins,[13] on the other, was evidenced during a sale of $45,000 worth of heroin to the agents on May 28, 1981. The agents paid $40,000[14] to Wilkins, who placed it in a shoulder bag. After the sale, Chaffin entered the residence of Galloway carrying the bag but emerged shortly thereafter without it.[15] The relationship between Chaffin and Carson was admitted by Carson—by her own account, they had been partners. Moreover, Carson and Wilkins admitted to a partnership relation between them after the ties between Carson and Chaffin had been severed. It was at this time that Carson

established direct connections to "the Italians." The outlines of the conspiracy at its lower levels was also established at trial: Mont served as source and partner to David Wilkins, and as a source to Guy Wilkins prior to his rise through the organization. Moreover, there is evidence that Carson operated a heroin mill out of her home and employed "Hillside," the Thomas brothers and others as lower-level distributors.

Denying any connection between Chaffin and himself and claiming that Guy Wilkins had multiple unrelated sources, Mont argues that the proof showed multiple conspiracies. There was evidence, however, from which a Mont-Chaffin connection could be found. Thus, in October 1980, when Wilkins introduced Chaffin to the agents as his new source, Wilkins, nevertheless, indicated that Mont and Chaffin were affiliated and further stated that Mont and David Wilkins did not wish to be cut out of their profit as intermediaries. This suggests strongly that Mont had been receiving heroin from Chaffin. Moreover, on February 23, 1981, Shawn Lovett, who worked for David Wilkins, spoke with Chaffin immediately prior to picking up a kilogram of heroin for David. During this period, Mont and David Wilkins were partners in the heroin business. Finally, both Carson and Guy Wilkins acknowledged the irony of Wilkins' dealing Carson's narcotics for over a year when neither knew the other personally. During this period. Wilkins was distributing heroin for Mont and Carson was Chaffin's partner.

In any event, there was substantial cooperation between Mont and Guy Wilkins even after Wilkins established his relationship with a "new" source of heroin, Chaffin, in October 1980. Wilkins obtained

some of the quinine that Mont and David Wilkins had purchased from the agents and used it to cut heroin he received from Chaffin. David's arrangement to pick up heroin from Chaffin in February 1981 further demonstrates the mutual assistance between Mont and David Wilkins, on the one hand, and Chaffin and Guy Wilkins on the other. In short, the proof at trial "revealed the existence of . . . unlawful operations by functional interlocking groups . . . who were virtually dependent on one another for overall success." *United States v. Alessi, supra,* 638 F.2d at 473. The inference that there as one loose-knit conspiracy as alleged is justified. *See United States v. Panebianco,* 543 F.2d 447, 452-53 (2d Cir. 1976), *cert. denied,* 429 U.S. 1103, 97 S.Ct. 1128, 51 L.Ed.2d 533 (1977); *United States v. Tramunti,* 513 F.2d 1087, 1106-07 (2d Cir.), *cert. denied,* 423 U.S. 32, 96 S.Ct. 54, 46 L.Ed. 50 (1975); *United States v. Sperling,* 506 F.2d 1323 (2d Cir. 1974); *United States v. Bynum,* 485 F.2d 490, 495-97 (2d Cir. 1973), *vacated and remanded on other grounds,* 417 U.S. 903, 94 S.Ct. 2598, 41 L.Ed.2d 209(1974).

Turning to appellants' knowledge and participation, there was sufficient evidence to sustain the jury's conviction of Mont, Carson and Thomas on the conspiracy charge. The proof shows that Mont conducted a substantial heroin business from the *Our Place Bar.* In addition to the transactions outlined above, there was testimony from which the jury could infer that Wilkins and his brother David received from Mont and sold a kilogram of heroin every week. Moreover, in his conversation with Agent Baker, Mont indicated that he anticipated no problem in satisfying Baker's demands for heroin. Mont had subordinates, such as David and Guy Wilkins, who assisted him in the distribution chain. Mont also

observed the advancement of Guy Wilkins through the organization, providing him with assistance in the form of quinine. The evidence, therefore, sustains the jury's finding that Mont had knowledge of the outlines of the enterprise, *United States v. Alessi, supra,* 638 F.2d at 474, and "knew from the scope of [its] operation that others were involved in the performance of functions vital to the success of the business." *United States v. Sisca,* 503 F.2d 1337, 1345 (2d Cir.), *cert. denied,* 419 U.S. 1008, 95 S.Ct. 328, 42 L.Ed.2d 283 (1974) (quoting *United States v. Bynum, supra,* 485 F.2d at 496; *United States v. Calabro,* 467 F.2d 973, 982-83 (2d Cir. 1972), *cert. denied,* 410 U.S. 926, 92 S.Ct. 978, 30 L.Ed.2d 801 (1973)). The government, of course, was under no obligation to show that Mont "knew every other member or was aware of all acts committed in furtherance of it." *United States v. Alessi, supra,* 638 F.2d at 473.[16]

Regarding Carson's involvement, she was, by her own admission, a partner of Chaffin, and then Wilkins, in the heroin trade. Carson's initial partnership with Chaffin dissolved after Chaffin became substantially indebted to both Carson and "the Italians." She also admitted dealing directly with customers from Washington, D.C. Moreover, the evidence showed that Carson used her residence as a cutting mill, where six or more people diluted and packaged heroin, and that she employed Hillside and the Thomas brothers as lower-level distributors. The jury was warranted in concluding that Carson knowingly participated in the conspiracy.

Evidence of Thomas' participation in the conspiracy is less compelling. However, the standard for appellate review of an insufficiency claim placed a

"very heavy burden" on the appellant. *United States v. Losada*, 674 F.2d 167, 173 (2d Cir.), *cert. denied*, __ U.S. __, 102 S.Ct. 2945, __ L.Ed.2d __ (1982). Our inquiry is whether the jury, drawing reasonable inferences from the evidence, may fairly and logically have concluded that the defendant was guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 317, 99 S.Ct. 2781, 2788, 61 L.Ed.2d 560, 572 (1979); *United States v. Barnes*, 604 F.2d 121, 157 (2d Cir. 1979), *cert. denied*, 446 U.S. 907, 100 S.Ct. 1833, 64 L.Ed.2d 260 (1980). In making this determination, we must view the evidence in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680, 704 (1942), and construe all permissible inferences in its favor, *United States v. Dazzo*, 672 F.2d 284, 288 (2d Cir.), *cert. denied*, __ U.S. __, 103 S.Ct. 81, __ L.Ed. __ (1982). Moreover, participation in a conspiracy may be proven by circumstantial evidence. *See United States v. Barnes, supra*, 604 F.2d at 156 and cases cited therein. Applying these standards, we hold that the evidence supporting Thomas' guilt on the conspiracy charge is sufficient.

Indicative of Thomas' membership in the conspiracy were, of course, his furtive street-corner activities, which the jury could infer were drug transactions. Although this proof, taken alone, is insufficient to support the conclusion that Thomas was dealing conspiracy heroin, there is more. Thomas' activities on August 6, 1981 are of great significance. The agents, as noted above, were looking for Howard Thomas pursuant to a prearranged agreement to purchase heroin from him. Fully aware of the agents' purpose, because Howard had told him, Thomas successfully assisted the agents in their search. From

this, the jury was entitled to conclude that Thomas was knowingly facilitating a heroin sale between Howard Thomas and the agents.

The same conclusion could be drawn with respect to Thomas' participation in an aborted heroin sale on August 10. On that occasion, Thomas, along with Howard Thomas and an unidentified woman, approached and stared at a DEA agent parked across the street from the heroin seller who occupied the Lincoln Continental. Thereafter, Howard cautioned the agents concerning the police presence. This "seemingly innocent act, when viewed in the context of surrounding circumstances," justified "an inference of complicity." *United States v. Calabro*, 449 F.2d 885, 890 (2d Cir. 1971), *cert. denied*, 404 U.S. 1047, 92 S.Ct. 428, 30 L.Ed.2d 735 (1972). When this evidence of knowing assistance is viewed in conjunction with Thomas' street-corner activities, which take on color in light of Howard's extensive heroin dealing, *United States v. Tramunti, supra*, 513 F.2d at 1108-09, it was reasonable for the jury to conclude that Thomas was a member of the conspiracy, albeit at the retail level. This inference is strenghtened upon consideration of evidence that the location where Thomas transacted his business was a heroin market—thus, the presence on this block of the heroin supplier in the Lincoln Continental and the proximity of the grocery store operated by Howard's heroin partner, "Hillside."

Thomas urges exculpatory explanations for each strand of evidence. However, "pieces of evidence must be viewed not in isolation but in conjunction." *United States v. Geaney*, 417 F.2d 1116, 1121 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028, 90 S.Ct. 1276, 25 L.Ed.2d 539 (1970). In this case, as in *United States v. Monica*,

295 F.2d 400, 401 (2d Cir. 1961), *cert. denied*, 368 U.S. 953, 82 S.Ct. 395, 7 L.Ed.2d 386 (1962), "each of the episodes gained color from each of the others." *See also, United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977). The government's proof need not "exclude every reasonable hypothesis, other than that of guilt" to support a conviction. *Holland v. United States*, 348 U.S. 121, 139-140, 75 S.Ct. 127, 137, 99 L.Ed. 150 (1954); *United States v. Taylor*, 464 F.2d 240, 244 (2d Cir. 1972); *see also, United States v. Lubrano*, 529 F.2d 633, 636 (2d Cir. 1975), *cert. denied*, 429 U.S. 818, 97 S.Ct. 61, 50 L.Ed.2d 78 (1976).

Thomas also contends that the government has failed to prove that he had knowledge of the overall conspiracy in which he participated. However, Thomas' membership was evidenced by continuing street-corner sales along with isolated instances in which he attempted to further or protect the business. Therefore, "[t]he jury could properly infer that [Thomas] had knowledge of others above him in the chain of distribution and that he was dependent on their activities. . . ." *United States v. Barnes, supra*, 604 F.2d at 159. *See also, United States v. Taylor, supra*, 562 F.2d at 1352-53, 1354; *United States v. Tramunti, supra*, 513 F.2d at 1110, 1112. Thus, the "single act" doctrine upon which Thomas relies, *see United States v. Torres*, 503 F.2d 1120, 1123-24 (2d Cir. 1974) and cases cited therein, is inapposite here. Moreover, there is evidence that Thomas was aware of drug transactions in which he did not participate directly—those involving his brother Howard and the agents. In short, "it could reasonably be inferred that [Thomas] participated in the alleged enterprise with a consciousness of its general nature and extent." *United States v. Alessi, supra*, 638 F.2d at 473. Again,

it is not the government's burden to prove that Thomas knew all the conspirators or each of their activities.

Even if a variance existed between the conspiracy charged and the conspiracies proved at trial, we would reverse as to an appellant only upon a showing that he had suffered substantial prejudice. *Kotteakos v. United States,* 328 U.S. 750, 764-65, 66 S.Ct. 1239, 1247-48, 90 L.Ed. 1557, 1566-67 (1946); *Berger v. United States,* 295 U.S. 78, 82, 55 S.Ct. 629, 630, 79 L.Ed. 1314, 1318 (1935). There is no such showing here. There was no charge here based on *Pinkerton v. United States,* 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946), which allows one member of a conspiracy to be convicted for substantive crimes if committed by another in furtherance of the conspiracy. We have found no hearsay statements uttered by a member of one of the conspiracies that was used to the detriment of a member of another. *United States v. Miley,* 513 F.2d 1191, 1208 (2d Cir.), *cert. denied sub nom. Vavrigos v. United States,* 423 U.S. 842, 96 S.Ct. 75, 46 L.Ed.2d 662 (1975). There was also no prejudicial "spillover effect." Evidence that each appellant conspired to distribute heroin was substantial. Moreover, although nineteen defendants were indicted, only four went to trial, and there were at most two conspiracies. Thus, the number of persons tried together was small enough to enable the jury to give individual consideration to each. *See, United States v. Alessi, supra,* 638 F.2d at 475 (ten defendants, conviction affirmed); *United States v. Ricco,* 549 F.2d 264, 271 (2d Cir.), *cert. denied sub nom. Indiviglia v. United States,* 431 U.S. 905, 97 S.Ct. 1697, 52 L.Ed. 389 (1977) (twelve indicted, three unindicted co-conspirators, five went to jury, two conspiracies, conviction affirmed).[17]

That the defendants were accorded such consideration appears from the verdicts: Carson was acquitted on one of the two substantive counts against her, and the jury acquitted Gayburnetta Galloway on the conspiracy count and was unable to reach a verdict on the substantive count against her. *United States v. Alessi, supra,* 638 F.2d at 475; *United States v. Toliver,* 541 F.2d 958, 963 (2d Cir. 1976). Finally, no "shocking or inflammatory" evidence was introduced against any of the defendants. *See, United States v. Alessi, supra,* 638 F.2d at 475; cf. *United States v. Bertolotti,* 529 F.2d 149, 158 (2d Cir. 1975). Rather, "the crimes of the various appellants were not markedly different," *United States v. Miley, supra,* 513 F.2d at 1209, and the evidence introduced at trial against all defendants consisted mainly of real and testimonial evidence pertaining to drug transactions. *See, United States v. Ricco, supra,* 549 F.2d at 271.

B. *Claims of Mont.*

Mont argues that the court below erroneously admitted a hearsay statement implicating him in the distribution of heroin. Finding this claim without merit, we affirm Mont's conviction on all counts.

During his testimony, Agent Baker recounted a conversation he had in Atlanta with an individual named "Sam." Baker met Sam at Guy Wilkins' suggestion and used the occasion to identify sources of heroin. Sam indicated that he did not deal in heroin but made two telephone calls in an unsuccessful attempt to locate a source. Sam then asked, "Why don't you go to Lam?[18] Is he the owner of the *Our Place Bar*?" Sam replied, "Yes, he is probably doing the largest amount of heroin in Manhattan." Sam said he

would go to New York and, if Baker had difficulty meeting Lam, he, Sam, would introduce them. Mont contends that these statements were inadmissible because Sam's membership in the conspiracy was not independently established and because the statements were not within any exception to the rule against hearsay. *See,* Fed.R.Evid. 801(d)(2)(E); *United States v. Geaney, supra,* 447 F.2d at 1120. The government responds that Mont failed to preserve this issue for appellate review and argues further that Sam's statements were admissible as statements of a co-conspirator, as verbal acts, and as an aid to the jury's understanding of background events leading to the agents' investigation of Mont. Finally, the government argues harmless error. We conclude that if it were error to admit these statements, it was harmless because (1) the jury already had twice heard the substance of Sam's remarks, and (2) there was substantial additional evidence of Mont's guilt.

There was earlier evidence that when Agent Baker purchased heroin from Guy Wilkins on July 18, 1980, Wilkins indicated that his source was the owner of the *Our Place Bar*[19] and that the owner would soon receive part of a two-hundred pound shipment of heroin.

Similarly, there was earlier testimony that on September 9, 1980, when Agents Baker and Coleman gave Guy Wilkins an ounce of quinine and Baker announced he wanted to trade quinine towards the cost of heroin, especially with "the *Our Place Bar* source of supply," Wilkins replied "that's possible," because that source was one of the largest dealers of heroin in Manhattan and would probably need the quinine. Baker asked whether that source had received part of the two-hundred pound shipment of heroin, and

Wilkins answered that it had not.

In short, Sam's statements merely corroborated what Wilkins, as member of the conspiracy well acquainted with Mont, had already said. Since the statements of Wilkins were admitted as statements of a co-conspirator in furtherance of the conspiracy, it is unlikely that those of Sam were significant factors in the jury's decision. Our conclusion that the error, if any, was harmless is reinforced by the fact that the evidence of Mont's guilt is compelling, as noted above.[20]

C. *Claims of Carson.*

In addition to challenging the sufficiency of the evidence supporting her conviction on the conspiracy count, Carson argues that there is insufficient evidence to sustain her conviction on a substantive charge. She also claims error in the trial court's charge respecting the effect that a finding of guilt on a substantive count should have on the jury's consideration of the conspiracy count. Finding no merit in these claims, we affirm Carson's convictions.

1. *The Substantive Count.*

Carson contends that there is insufficient evidence to support her conviction on Count 15, which charged her with possession with intent to distribute, and with distribution of, heroin in a July 25, 1981 sale to Agents Baker, Johnson and Williams. The question for us is whether there was evidence from which the jury could have found, beyond a reasonable doubt, that Carson knowingly participated in the sale. We conclude that the evidence was sufficient and affirm her conviction on Count 15.

On July 21, Wilkins had agreed to act as an intermediary in a heroin sale between the agents and Fred Galloway. There was no mention of Carson, but four days later, on July 25, when Wiolkins arrived at the *Flash Inn* to meet the agents as planned, he was accompanied by Carson, whom he introduced as her "partner." Acknowledging the relationship. Carson confirmed the details of the partnership with Wilkins and discussed the heroin business. The partners — Carson and Wilkins — then drove with Agent Williams to the *Close Encounters Discotheque.* Enroute, Carson engaged in a narcotics-related conversation from which there can be no doubt that she was fully aware that the agents' purpose in going to the discotheque was to buy heroin from Galloway and Wilkins. When they arrived at the discotheque, arrangements were made for Gayburnetta Galloway to go some place, pick up the heroin and return with it. During Gayburnetta's absence, a fight broke out among patrons. Fearful that the police would arrive, Carson remarked to Agent Johnson that Galloway, whom she had greeted earlier, was stupid for allowing a fight to go on when he was "taking care of business."

Fully aware that delivery of the heroin was imminent and that the police were likely to arrive on the scene momentarily to deal with the fight, Carson went outside with the agents and was later joined by Wilkins. When Gayburnetta arrived, Wilkins said, "the dope's here. Let's go inside," and the group, including Carson, reentered the discotheque. Gayburnetta brought the heroin to an office in the discotheque. After conversing with Galloway and receiving $42,000 cash from the agents, Wilkins retrieved a paper bag from the office and handed it to Agent Baker.

Agent Baker gave the bag to Agent Johnson, who left to perform a field test on its contents. The test indicated heroin, and Johnson returned to the discotheque. Having earlier assured the agents that she could supply heroin if they wanted it, Carson gave Agent Johnson her telephone number upon his request. She then warned Agent Johnson that police were in the discotheque, and the agents left.

The jury could reasonably conclude from this evidence that Carson knowingly participated in the July 25 heroin transaction and assisted in its successful completion. In particular, her fear of police intervention, her warnings to Agent Johnson, and her participation in the outside watch for Gayburnetta, permit the inference that Carson acted as a lookout. As Wilkins' "partner," she had a clear interest in the success of the transaction. The jury was warranted in finding that her appearance with Wilkins at the *Flash Inn* on the morning of July 25 was not as an innocent companion but as a sophisticated partner in the planned sale. *Cf. United States v. Calabro, supra,* 449 F.2d at 890. Her presence enabled her to observe and size up the customers and assure them that they were dealing with an established and reliable source of supply with a view to promoting and successfully completing the pending, as well as future, heroin deals.[21] This conclusion is supported by Carson's later refusal to deal with the agents because they "asked too many questions" on the night of the sale. This evidence, considered in light of the circumstances, permitted the jury to conclude, beyond a reasonable doubt, that Carson knowingly assisted in the sale, participated in it as something she wished to bring about, had a stake in its success, and sought by her actions to make it succeed. It was therefore reasonable for the jury to conclude that she was an aider and abettor in the sale. 18

U.S.C. §2; *United States v Barton*, 647 F.2d 224, 239 n. 12 (2d Cir.), *cert. denied*, 454 U.S. 857, 102 S.Ct. 307, 70 L.Ed. 2d 152 (1981); *United States v. Clemente*, 640 F.2d 1069, 1078-79 (2d Cir.), *cert. denied*, 454 U.S. 820, 102 S. Ct. 102, 70 L.Ed. 2d 91 (1981); *United States v. Bommarito*, 524 F.2d 140, 145 (2d Cir. 1975); *United States v. Pui KanLam*, 483 F.2d 1202, 1207-08 (2d Cir. 1973), *cert. denied*, 415 U.S. 984, 94 S.Ct. 1578, 39 L.Ed. 2d 881 (1974).

2. The Jury Charge

During its deliberations, the jury sent a note to the court, stating: "The jury requests to know whether a decision of guilt on a substantive count automatically denotes guilt on the count of conspiracy." Answering the note, Judge Brieant instructed: "The answer to your question, in two words, is 'absolutely note.' " Carson argues that "[a]lthough the trial judge charged the jury that conviction on Count I should not be 'automatic' if they found Carson had committed the acts charged against her in Count XV, as a practical matter, the jury's verdict finding Carson guilty on Count XV virtually automatically had to result in a guilty verdict as to Count I as well." (Br. at 23). This argument is frivolous.

Although Judge Brieant did charge that a finding of guilt on a substantive charge could be considered by the jury in evaluating the conspiracy count, he repeatedly stressed that the elements of the crime were different, that each count had to be considered separately, and that each element of the crime had to be proven beyond a reasonable doubt before a verdict of guilt could be rendered on any count. Moreover, the court instructed the jury to decide each count of the

indictment separately as to each defendant who was named in the count.

In view of the foregoing, Carson's conviction on the conspiracy count is also affirmed.

D. *Claims of Kenneth Thomas.*

Challenging his conviction on the conspiracy count, Thomas raises four issues on appeal in addition to his claim that the evidence was insufficient. He argues that the district court erred in denying his motion for a severance, in refusing to instruct the jury that the charge on aiding and abetting was not applicable to the conspiracy count, and in erroneously admitting into evidence contraband found in his possession at the time of his arrest, along with the agents' testimony that Thomas had engaged on numerous occasions in what appeared to be drug transactions. We find these claims to be without merit and affirm Thomas' conviction on the conspiracy count.

1. Severance.

Thomas' claim that the district court erred in denying his motion for a severance is based on two arguments. First, he asserts that the disproportionate charges and proof against him, as compared to his co-defendants, caused substantial prejudice. Second, he contends that the jury convicted him on the basis of guilt by association because there was substantial proof that the heroin conspiracy was a family business in which his brother, Howard Thomas, was culpably involved.[22] Thus, in essence, Thomas argues that he was unfairly prejudiced by the introduction of evidence concerning his co-defendants, which spilled over into the jury's consideration of the case against

him. We disagree.

In *United States v. Losada, supra,* we recently noted the "heavy burden of persuasion" that an appellant bears in urging reversal of a trial court's decision not to grant a severance. 674 F.2d at 171. "[T]he decision to grant or deny a severance pursuant to Rule 14 is within the broad discretion of the trial court and will not be overturned on appeal absent some showing that the defendant suffered substantial prejudice due to the joint trial." *Id.* (quoting *United States v. Weisman,* 624 F.2d 1118, 1129-30 (2d Cir.), *cert. denied,* 449 U.S. 871, 101 S.Ct. 209, 66 L.Ed.2d 91 (1980)). That the defendant would have had a better chance of acquittal at a separate trial does not constitute substantial prejudice. *United States v. Sotomayor,* 592 F.2d 1219, 1228 (2d Cir.), *cert. denied sub nom. Crespo v. United States,* 442 U.S. 919, 99 S. Ct. 2842, 61 L.Ed.2d 286 (1979); *United States v. Stirling,* 571 F.2d 708, 733 (2d Cir.), *cert. denied,* 439 U.S. 824, 99 S Ct. 93, 58 L.Ed. 2d 116 (1978). Moreover, in determining whether a trial court's decision was correct, "a reviewing court should consider the need for judicial economy and the extent to which the judge instructed the jury to consider the evidence separately with respect to each defendant." *United States v. Losada, supra,* 674 F.2d at 171.

There is no question that Thomas played a less prominent role in the conspiracy than many of his co-defendants. However, differing levels of culpability and proof are inevitable in any multi-defendant trial and, standing alone, are insufficient grounds for separate trials. *United States v. Aloi,* 511 F.2d 585, 598 (2d Cir.), *cert. denied,* 423 U.S. 1015, 96 S.Ct. 447, 46 L.Ed.2d 386 (1975). Moreover, the fact that

evidence may be admissible against one defendant but not another does not necessarily require a severance. *United States v. Losada, supra,* 674 F.2d at 171; *United States v. Lyles,* 593 F.2d 182, 190 (2d Cir.), *cert. denied,* 440 U.S. 972, 99 S. Ct. 1537, 59 L.Ed. 2d 789 (1979); *United States v. Aloi, supra,* 511 F.2d at 598. Here, the trial court instructed the jury on numerous occasions to accord each defendant separate consideration. *United States v. Losada, supra,* 674 F.2d at 171-72; *United States v. Weisman, supra,* 624 F.2d at 1130. The evidence against Thomas was simple enough for the jury to consider without significant spillover effect. *United States v. Losada, supra,* 674 F.2d at 171; *United States v. Barton, supra,* 647 F.2d at 241; *United States v. Weisman, supra,* 624 F.2d at 1130. That the jury did so appears from the verdicts, as noted above. *United States v. Weisman, supra,* 624 F.2d at 1130; *United States v. Barnes, supra,* 604 F.2d at 161. Thus, the disparity in the proof and charges did not unfairly prejudice Thomas.

Nor does it appear that the jury was unable to distinguish among family members in finding guilt or innocence. Gayburnetta Galloway was acquitted even though her father, who pled guilty prior to trial, testified to his criminal involvement. In any event, proof of Howard Thomas' heroin-related activities would have been admissible against Thomas in a separate trial to establish the existence of the conspiracy. *See, United States v. Praetorius,* 622 F.2d 1054, 1063 (2d Cir. 1979), *cert. denied sub nom. Lebel v. United States,* 449 U.S. 880, 101 S. Ct. 162, 66 L.Ed. 2d 76 (1980). Consequently, the joint trial did not result in substantial prejudice to Thomas.

2. The Court's Instructions on Aiding and Abetting.

The trial judge charged that anyone who "aids, abets, counsels, commands, induces or procures" the commission of a federal offense is punishable as a principal. This instruction was repeated in response to a note from the jury asking for clarification of the meaning of "intent" as stated in the indictment. Thomas argues that this charge on aiding and abetting was unfairly prejudicial because it permitted the jury to convict him as an aider and abettor while finding insufficient evidence of his knowing membership in the conspiracy. This claim is also without merit.

In its main charge, the court had consistently discussed the conspiracy and substantive counts separately, and clearly specified and defined each of the elements of the conspiracy charge, including knowing participation. Before defining "aiding and abetting," the court instructed at the outset that the concept could be considered in connection with the counts then under discussion, *i.e.*, the substantive counts. Previously, the court had cautioned that Thomas was charged only with conspiracy and not with any substantive crimes. The court construed the jury's note as a request for clarification of the meaning of "intent" as relating to the phrase "possession with intent to distribute," and concluded its response to the note as follows:

> A person possesses with intent to distribute if she aids or abets some other person in selling or possessing with intent to distribute or distributing heroin, and does so knowingly and wilfully.
>
> I instruct you that you may find intent from considering all of the evidence in the case. However, specific

> criminal intent must be proved beyond a reasonable doubt *before a person may be convicted of any of these substantive crimes* in this indictment with respect to possession or intent to distribute. (Emphasis added.)

Counsel for Thomas did not object to this charge. Nor did he request that the court distinguish between substantive crimes and the conspiracy charge at this point.

Objection came to the court's response to a later note from the jury requesting assistance regarding the liability of a defendant for acts committed by a co-conspirator. The court responded by instructing that:

> *In deciding the substantive count* you decide whether the person whose case you are then considering in the substantive count knowingly and wilfully either committed all the elements or knowingly and wilfully aided and abetted someone else to do the crime. An aider and abettor is accountable for the criminal acts of the principal. That I did tell you. But a member of the conspiracy is not on the theory of this case accountable for a substantive crime committed by a member of the conspiracy, by another member, in furtherance of it. (Emphasis added.)

Counsel for Thomas then requested the court to instruct that the charge on aiding and abetting was not applicable to the conspiracy count, and the court refused.

The court's charges on aiding and abetting, whether viewed separately or, as they should be in the context of the entire charge, *United States v. Scacchetti*, 668 F.2d 643, 649 (2d Cir. 1982), were correct. In short, there is little likelihood that the jury was misled into believing that one who was not shown to

be a knowing member of the conspiracy could be convicted as a member on a theory of aiding and abetting. The jury's lack of confusion is evidenced by its acquittal of Galloway on the conspiracy count while failing to reach a verdict on the substantive count. *See, United States v. Sanzo*, 673 F.2d 64, 69 (2d Cir. 1982).

3. Admissibility of the Seized Contraband.

When Thomas was searched incident to his arrest, two vials containing traces of heroin and cocaine and several cellophane envelopes were found in his possession, and these items were received in evidence at trial.[23] Thomas argues that the admission of the contraband was so prejudicial that it should have been excluded because it was proof of similar uncharged crimes and that the period of one week between the filing of the indictment (October 13, 1981) and his arrest (October 20, 1981) was too lengthy to permit an inference of his participation in the conspiracy.

As we have often observed, the trial judge has broad discretion in ruling on the admissibility of relevant evidence: "the preferable rule is to uphold the trial judge's exercise of discretion unless he acts arbitratily or irrationally." *United States v. Robinson*, 560 F.2d 507, 515 (2d Cir. 1977) (en banc), *cert. denied*, 435 U.S. 905, 9 S. Ct. 1451, 55 L. Ed. 2d 496 (1978). There has been no showing that the trial judge was either arbitrary or irrational in balancing the probative value of this evidence against its prejudicial effect. Quite the contrary. Even if we assume that the contraband proved similar uncharged crimes, glassine envelopes and vials containing narcotics are tools of the drug trade, and evidence of possession of them at a closely related time is relevant to the conspiracy

charge and not a mere showing of bad character, even if they relate to transactions outside the scope of the conspiracy. *See, e.g., United States v. Barnes, supra,* 604 F.2d at 166-67; *United States v. Viserto,* 596 F.2d 531, 537-38 (2d Cir.), *cert. denied,* 444 U.S. 841, 100 S. Ct. 80, 62 L.Ed.2d 52 (1979).

Standing alone, the one-week lapse of time between the filing of the indictment and seizure of the contraband was so lengthy as to render the evidence too remote from the crime to preclude an inference that Thomas participated in the conspiracy, even if Thomas' source, his brother Howard, was arrested on October 4, 1981, sixteen days before the seizure. *See, United States v. Taylor, supra,* 562 F.2d at 1358; *United States v. Bermudez,* 526 F.2d 89, 95-96 (2d Cir. 1975), *cert. denied,* 425 U.S. 970, 96 S. Ct. 2166, 48 L.Ed.2d 793 (1976); *United States v. Tramunti, supra,* 513 F.2d at 115-16; *United States v. Mallah,* 503 F.2d 971, 982 (2d Cir. 1974), *cert. denied,* 420 U.S. 995, 95 S. Ct. 1425, 43 L.Ed.2d 671 (1975).

4. Testimony Regarding Street-Corner Transactions.

Thomas argues that the district court erred in allowing Agents Johnson and West to testify concerning their observations of Thomas engaging in what appeared to them to be narcotics transactions. First, he claims that the testimony did not relate sufficiently to the conspiracy charged and, thus, constituted inadmissible proof of other crimes under Fed. R. Evid. 404(b). In addition, Thomas contends that the agents should not have been permitted to testify as to their opinions regarding the nature of Thomas' activities. We find no error in the trial judge's ruling on these evidentiary points.

Johnson and West made their observations during the course of their undercover activities. Each agent testified that he observed Thomas covertly passing something to people on the street in exchange for cash. During Johnson's testimony, counsel for Thomas objected to Johnson's conclusion that these exchanges appeared to him to be drug transactions. Counsel did not object or contend that Johnson's description constituted proof of other crimes. Nor did he move to strike it on that basis. Moreover, counsel did not object at all to West's testimony concerning his observations and conclusions.

Having failed to object to this testimony on the ground now urged, Thomas waived an objection that the testimony constituted inadmissible evidence of other crimes. *See, United States v. Hutcher,* 622 F.2d 1083, 1087 (2d Cir.), *cert. denied,* 449 U.S. 875, 101 S.Ct. 218, 66 L.Ed.2d 96 (1980). Moreover, as we have said earlier, evidence of Thomas' apparent drug-related activities was relevant to the conspiracy charge, even if it proved other crimes. *See, United States v. Barnes, supra,* 604 F.2d at 166; *United States v Viserto, supra,* 596 F.2d at 536, 537-38. Thus, the trial court did not abuse its discretion in failing to strike the testimony. The admissibility of this evidence was not dependent on direct proof that the drugs sold by Thomas were of conspiracy origin. As we noted in *Viserto, supra,* "[n]arcotics is a business, though an illegitimate one, and evidence that the defendants were in the business at a closely related time is relevant, and is not a mere showing of bad character." 596 F.2d at 537-38. Thomas also contends that the furtive exchanges may have related to other illicit activity, but this effects the weight of the proof and not its admissibility.

Now was it error for the court to permit the agents to testify that Thomas' furtive activity appeared to them to be sales of narcotics. Under Fed.R.Evid. 702, expert testimony is admissible if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." The subject of the expert testimony here, *i.e.*, the clandestine manner in which drugs are bought and sold, is unlikely to be within the knowledge of the average layman. *United States v. Johnson*, 575 F.2d 1347, 1361 (5th Cir. 1978), *cert. denied*, 440 U.S. 907, 99 S. Ct. 1214, 59 L.Ed.2d 454 (1979). The conclusions of the agents were based on years of experience investigating narcotics offenses.[24] This provided them with specialized knowledge, not possessed by the jury, of the manner in which drug transactions are conducted. Thus, under Rule 702, it was proper for the agents to recount their observations and render an opinion based on them. *See, e.g., United States v. Borrone-Iglar*, 468 F.2d 419, 421 (2d Cir. 1972), *cert. denied sub nom. Gernie v. United States*, 410 U.S. 927, 93 S. Ct. 1360, 35 L.Ed. 2d 588 (1973) (expert opinion of DEA agent that coded conversations involved narcotics transaction admissible); *see also, United States v. Martino*, 664 F.2d 860, 864 n.3 (2d Cir. 1981); *United States v. Cirillo*, 499 F.2d 872, 881 (2d Cir.), *cert. denied*, 419 U.S. 1056, 95 S. Ct. 638, 42 L.Ed.2d 653 (1974). "[T]he trial judge has broad discretion in the matter of the admission or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous." 3 J. Weinstein & M. Berger, Weinstein's Evidence Pars. 702[02]; *McGrego-Doniger, Inc. v. Drizzle Inc.*, 599 F.2d 1126, 1138 n. 7 (2d Cir. 1979); *Fernandez v. Chios Shipping Co.*, 542 F.2d 145, 153 (2d Cir. 1976). Again, there is no indication that the trial court's ruling constituted an abuse of discretion.

CONCLUSION

Finding the judgments of conviction entered below to be supported by substantial evidence, and finding no reversible error, we affirm the convictions of all appellants on all counts.

FOOTNOTES

*Of the Southern District of New York, sitting by designation.

1. 21 U.S.C. §846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

2. 21 U.S.C. §§841(a)(1), (b)(1)(A) provide:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.
>
> (b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:
>
> (1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more

than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000 or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

18 U.S.C. §2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

3. Of the remaining fifteen defendants, eleven have pleaded guilty and are serving their sentences. Four defendants remain at large.

4. Judge Brieant sentenced Carson to consecutive terms of imprisonment of fifteen and five years on Counts 1 and 15, respectively, to be followed by a special parole term of three years. Mont was sentenced as a second felony offender, pursuant to 21 U.S.C. §851, to concurrent terms of imprisonment of thirty years on Counts 1, 7 and 8, to be followed by lifetime special parole. Thomas was sentenced to fourteen years on Count 1. Gayburnetta Galloway

entered into a deferred prosecution agreement with the government following trial with respect to the substantive charge.

5. The *Our Place Bar* was legally owned by an entity whose sole officer was Hope Haynes, a friend of Mont. Mont described himself as a bar owner on an application for an account with a brokerage firm. After his arrest, Mont told the agents that he was a bar manager.

6. On August 12, 1980, Agent Coleman unsuccessfully attempted to pick up the heroin sample. Upon arriving at the *Our Place Bar* that day, Coleman overheard Guy Wilkins speaking to an individual named "Lam" on the telephone. "Lam" was Mont's nickname, as evidenced by a bracelet he wore that read "LAM" in diamonds.

7. The possibility of selling "stolen" liquor to Mont was raised first by Agents Baker and Coleman in a September 12, 1980 meeting with Guy Wilkins. Wilkins agreed to mention the liquor to "the owner of the *Our Place Bar.*"

8. On July 17, 1981, Guy Wilkins told Agent Baker, when Baker inquired about sources of heroin, that he, Wilkins, had "made contact" with Carson and another woman. This "other woman," Wilkins indicated, imported the heroin. Wilkins also stated that if Baker were to meet with her, he, Baker, would not need to deal with anyone else.

At the July 17 meeting, Wilkins also stated that Chaffin, from whom the agents had bought heroin, had fallen out of favor with other conspirators because he owed over $100,000 to "the Italians" and over $58,000 to "Can Do's" (Kenneth Nunes') sister, Carson. Carson confirmed this on the morning of July 25, 1981, while driving to the *Close Encounters Discotheque,* indicating to Agent Williams that Chaffin could not be trusted because he owed people money. Chaffin, Carson said, owed her $58,000 for a heroin

package, along with an additional $12,000. Later, at the discotheque, Carson told Agent Johnson that Chaffin was there because he wanted to borrow money, but that his credit was bad because he owed people money, confirming the figures that Wilkins had stated previously. According to Carson, "the Italians" had advanced $100,000 worth of heroin to Chaffin because she vouched for him, but Chaffin failed to repay them. Because of this, Carson had severed her relationship with Chaffin and taken on Wilkins as a new partner.

9. For a fuller description of the events of July 25, see the discussion of Carson's conviction on the substantive count, *infra*.

10. Baker and Johnson also met with Wilkins a day earlier, on July 27. Wilkins informed the agents that Carson was unable to attend the meeting because she had to prepare for a sale of heroin to customers who had come to New York from Washington, D.C.

11. As we have noted on many occasions, whether the evidence shows multiple conspiracies is normally a question of fact for a properly instructed jury. *United States v. Alessi*, 638 F.2d 466, 472 (2d Cir. 1980); *United States v. Murray*, 618 F.2d 892, 902 (2d Cir. 1980); *United States v. McGrath*, 613 F.2d 361, 367 (2d Cir. 1979); *United States v. Taylor*, 562 F.2d 1345, 1351 (2d Cir.), *cert. denied sub nom. Salley v. United States*, 432 U.S. 909, 97 S.Ct. 2958, 53 L.Ed.2d 1083 (1977); *United States v. Armedo-Sarmiento*, 545 F.2d 785, 789 (2d Cir. 1976), *cert. denied*, 430 U.S. 917, 97 S.T. 1330, 51 L.Ed.2d 595 (1977).

12. The importance of the "Italian connection" was illustrated in May 1981, when heroin was in short supply. On May 20, Guy Wilkins informed the agents that there was no heroin available because of the death of one of "the Italians" and a resulting reorganization. The reorganization, Wilkins said, involved Chaffin and a friend of

Chaffin's, for whom "the Italians" had purchased a discotheque in Westchester County. ON May 27, 1981, Wilkins and Chaffin each told the agents that Chaffin had two partners with direct connections to "the Italians" and that these partners received their heroin in fifteen-kilogram lots. Later, on July 17, 1981, Wilkins told the agents that Fred Galloway received his heroin from the same source—"the Italians"—as Chaffin did.

13. Initially, Guy Wilkins sold the agents heroin that he had obtained from Mont and David Wilkins. However, David Wilkins, suspecting that the agents were agents, was reluctant to deal with them, and Guy Wilkins began searching for new sources ofheroin. GuyWilkins found his new source in Chaffin, and together they dealt with the agents from November 1980 to June 1981. Thereafter, Chaffin fell out of favor with "the Italians" and others, and Guy Wilkins began his partnership with Carson.

Additional evidence of a Guy Wilkins-Fred Galloway connection is an aborted sale of quinine by the agents to Galloway, which took place on August 4, 1981. On that date, Agents Baker and Johnson, along with Guy Wilkins, delivered a barrel of quinine to the *Close Encounters Discotheque. Galloway, refusing to speak directly with the agents, sent word through Wilkins that he did not need quinine at that time and preferred cash payments for heroin.*

14. The remaining $5,000 was paid on June 23, 1981.

15. Thereafter, Chaffin, Wilkins and an unidentified female drove to the residence of Carson, from which Chaffin and Wilkins emerged after a short period of time.

16. Mont argues that "the record isconspicuously silent of [sic] even the slightest reference to Mont from October 31, 1980 to October 4, 1981, the day Mont was arrested" (reply brief at 14). However, itis well settled that "participation in a conspiracy may continue beyond the performance

of an overt act by the alleged conspirator, if the conspiracy continues in existence thereafter," *United States v. Cianchetti*, 315 F.2d 584, 589 (2d Cir.1 963), and that a turnover in personnel does not necessarily terminate a conspiracy, *United States v. Penebianco*, 543 F.2d 447, 453 (2d Cir. 1976), *cert. denied*, 429 U.S. 1103, 97 S.Ct. 1129, 51 L.Ed.2d 553 (1977) (citing cases). In *United States v. Stromberg*, 268 F.2d 256 (2d Cir.), *cert. denied*, 361 U.S. 863, 80 S. Ct. 123, 44 L.Ed.2d 102 (1959), neither a year-long hiatus in the government's evidence nor the absence of mention of the appellants in the post-hiatus evidence required reversal of appellants' convictions. *Id.* at 263-64. And in *United States v.Brewer*, 630 F.2d 795 (10th Cir. 1980), the conviction was affirmed despite the fact that the appellant disappeared from the conspiracy when his narcotics supplier and his customer began dealing directly. *Id.* at 799-800. That the agents' investigation did not focus on Mont after October 1980 is irrelevant to the question whether the evidence demonstrates that Mont knowingly participated in the conspiracy charged in the indictment.

17. *Cf. Kotteakos v. United States*, 328 U.S. 750, 753, 66 S.Ct. 1239, 1242, 90 L.Ed.2d 1557, 1560 (1946) (thirty-two indicted, nineteen tried together, thirteen went to jury, conviction reversed); *United States v. Bertolotti*, 529 F.2d 149, 156 (2d Cir. 1975) (twenty-nine indicted, thirty-one unindicted co-conspirators, seventeen went to jury, at least four conspiracies, conviction reversed).

18. "Lam," of course, is a nickname for Mont, whose initials are "L.A.M." *See* note 6 *supra*.

19. Guy Wilkins repeated this statement in an August 12, 1981 conversation with Agent Baker.

20. Mont challenges the admissions of statements implicating him in the conspiracy on the ground that they constitute inadmissible hearsay. However, there is sufficient evidence tying all appellants to the conspiracy to

render such statements admissible as declarations of a co-conspirator in furtherance of the conspiracy. *See* Fed. R. Evid. 801(d)(2)(E) and *United States v. Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028, 90 S. Ct. 1276, 25 L.Ed. 2d 539 (1970).

21. In a July 17, 1981 conversation with the agents, Wilkins indicated that, since Chaffin was out of favor with "the Italians," he, Wilkins, could offer two potential sources of supply: Galloway, Chaffin's former partner, or Carson. Baker stated that he preferred to deal with Galloway. Baker also asked whether Galloway's heroin would be of the same quality as Chaffin's. Wilkins replied that the heroin would come from the same source, "the Italians." Thus, the inference is reasonable that Carson was attempting to change the agents' preference for Galloway as a source of supply.

22. In addition to the fact that numerous defendants were related, there was other evidence indicating that the conspiracy was a "family business." Thus, during a heroin sale to the agents on June 24, 1980, Anthony Pegues referred to the heroin business in which he and Guy Wilkins were involved as a "family thing." Similarly, on August 10, 1981, Kenneth Nunes quoted Agent Johnson a favorable price of $8,500 for heroin because their business was "family."

23. After Judge Brieant ruled that the heroin was admissible, counsel for Thomas insisted that the cocaine be admitted as well.

24. Agents Johnson and West together served for twenty years as officers of the narcotics branch of the Washington, D.C. police department.